

No. 151

Office Stamp

FBI

JAN 7

W. G. S.

IN THE  
**United States Supreme Court**

PIERCE OIL CORPORATION.....*Appellant,*

vs. No. 151.

LUTHER HOPKINS, COUNTY CLERK  
OF SEBASTIAN COUNTY, ARKAN-  
SAS, ET AL. ....*Appellees*

APPEAL FROM THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE  
EIGHTH CIRCUIT.

**ABSTRACT, ARGUMENT AND BRIEF FOR  
APPELLEES**

J. S. UTLEY,  
*Attorney General;*

JOHN L. CARTER,

WM. T. HAMMOCK,

MISS DARDEN MOOSE,

J. S. ABERCROMBIE,  
*Assistants Attorney General.*



## INDEX.

	Pages
Abstract and Statement .....	3- 4
Argument and Citations .....	4-69
Contention of Appellant Conceded .....	4
State's Police Power .....	4- 6
Act 606 Does Not Hold Appellant for Debt or Default of Another .....	6- 7
Act Levies a Privilege and Not a Property Tax .....	7-10
Act Harmonizes with State Constitution as a Privilege Tax .....	10-15
Act Not Void for Uncertainty .....	15-21
Analysis of Act .....	21-24
Does Not Contravene Section 1 of Fourteenth Amedment nor Section 8, Article 2, of State Constitution .....	24-32
Act Is Within Sphere of Legislative Power .....	32-39
Does Not Contravene Section 5, Article 16, State Constitu- tion, nor the Federal Constitution .....	39-46
Does Not Discriminate nor Violate Section 18 of Article 2 of State Constitution .....	46-53
Recent Construction of Act by Arkansas Supreme Court .....	54-57

## AUTHORITIES CITED.

Davies vs. Hot Springs, 141 Ark., 521; Southwestern Oil Co. vs. Texas, 217 U. S., 114; Fireman's Insurance Co. vs Davis, 130 Ark., 576; Lewelling vs. Mfg. Woodworkers, 140 Ark., 124 .....	5
Keller vs. United States, 213 U. S., 138; Boston Beer Co. vs. Massachusetts, 97 U. S., 25; Brown vs. Walling, 204 U. S., 320 .....	6
Ricard vs. State, 133 Ark., 1; State vs. Embrey, 135 Ark., 262 .....	9
State vs. Hanna, 131 Ark., 129; Royder vs. Warrick, 133 Ark., 491 .....	9-10
Dobbs vs. Holland, 140 Ark., 398 .....	10
Ex Parte Byles, 93 Ark., 616 .....	11-12
Wood vs. Wood, 54 Ark., 172; Howard vs. State, 72 Ark., 586 .....	17-18
McDaniel vs. Hearn, 120 Ark., 288; Leanord vs. State, 95 Ark., 381 .....	22
Hooper vs. California, 155 U. S., 657 .....	22
Ballard vs. Hunter, 294 U. S., 241 .....	25
Pennoyer vs. Neff, 95 U. S., 714-733 .....	25
Hurtado vs. People of California, 110 U. S., 516 .....	25
Bells Gap Ry. Co. vs. Pennsylvania, 134 U. S., 232 .....	26
Soon Hing vs. Crowley, 113 U. S., 703; Missouri vs. Lewis, 101 U. S., 22 .....	26
Eldridge vs. Trezevant, 160 U. S., 452; Ken. Rd. Cases, 115 U. S., 321 .....	26-27
Munn vs. Illinois, 94 U. S., 123; Mo. Pac. Ry. Co. vs. Humes, 115 U. S., 520 .....	27-28

# INDEX—Continued.

	Pages
New York vs. Amoskeag Sav. Bk. vs. Purdy, 231 U. S., 373	28
Clement Natl. Bk. vs. Vermont, 231 U. S., 120	29
Cit. Natl. Bank vs. Vermont, 231 U. S., 120	29
Natl. Safe Dep. Co. vs. Stead, 232 U. S., 58	29
Mer. and Mgrs. Bk. vs. Penn., 167 U. S., 461; Rosenthal vs. New York, 226 U. S., 260	30-31
Cook vs. Penn., 97 U. S., 571; Dent vs. W. Va., 129 U. S., 114	32
Butler vs. Drainage Dist., 99 Ark., 100; Marvin vs. Fussell, 93 Ark., 336	33
McClure vs. Topf, 112 Ark., 342; Ouachita County vs. Rumph, 43 Ark., 527	33
State vs. Ashley, 1 Ark., 513; Pulaski County vs. Irwin, 4 Ark., 473	33-34
Kirtland vs. Hotchkiss, 100 U. S., 491; Minn. Ry. vs. Beckwith, 129 U. S., 26	34
Picard vs. E. Tenn. Ry. Co., 130 U. S., 641; Bridge vs. Henderson City, 183 U. S., 592	35
Cooley on Taxation and Clark vs. Kansas City, 176 U. S., 119	35
Williams vs. Arkansas, 217 U. S., 79; McLean vs. Williams, 211 U. S., 539	35-36
Powell vs. Penn., 127 U. S., 678; Kidd vs. Pearson, 128 U. S., 1	36-37
Nashville, Chat. & St. Louis Ry. vs. Alabama, 128 U. S., 82	37
Hammond Pack. Co. vs. Arkansas, 212 U. S., 322; St. L. S. W. Ry. vs. Ark., 235 U. S., 273	38
Fletcher vs. Oliver, 25 Ark., 289; State vs. Handlin, 100 Ark., 549	40
Fort Smith vs. Scruggs, 70 Ark., 549; Rogers vs. Hennefin Co., 240 U. S., 184	41
Gulf, Col. & Santa Fe Ry. vs. Ellis, 165 U. S., 150	41-42
Cinn., N. O. & T. P. Ry. vs. Ken., 115 U. S., 321; Cook vs. Marshall Co., 196 U. S., 274	42
Merchants Natl. Bank vs. Pennsylvania, 167 U. S., 461	42
Magoun vs. Ill. Tr. & Sav. Bk., 170 U. S., 283; Billings vs. Ill., 188 U. S., 97	43
Am. Steel & Wire Co. vs. Speed, 192 U. S., 500; Armour P. Co. vs. Lacey, 200 U. S., 226	44
Pac Exp. Co. vs. Siebert, 142 U. S., 339; Home Ins. Co. vs. N. Y., 134 U. S., 594	45
Gioza vs. Tiernan, 148 U. S., 657; Cribbs vs. Benedict, 64 Ark., 555	45
State vs. South. Sand and Mat. Co., 113 Ark., 159; West. T. Assn. vs. Greenburg, 204 U. S., 359	47
Helena vs. Dunlap, 102 Ark., 131; United States vs. Del. & Hud. Co., 213 U. S., 407	49
Askren vs. Continental Oil Co. et al., 252 U. S., 444	51-52
Harry S. Bowman vs. Cont. Oil Co., 256 U. S., 642	52
Recent Opinion of Arkansas Sup. Ct., as certified and filed	54-57
Texas Co. vs. Brown, 258 U. S., 466	68

IN THE  
**United States Supreme Court**

---

PIERCE OIL CORPORATION.....*Appellant,*

vs.

No. 151.

LUTHER HOPKINS, COUNTY CLERK  
OF SEBASTIAN COUNTY, ARKAN-  
SAS, ET AL. .... *Appellees*

---

*APPEAL FROM THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE  
EIGHTH CIRCUIT.*

---

**ABSTRACT, ARGUMENT AND BRIEF FOR  
APPELLEES**

---

**ABSTRACT.**

Adopting the statement of appellant's brief, the appellees now further show that in the court below a demurrer to appellant's original petition as a whole was interposed on the ground that appellant is not the real party interested, and, therefore, not competent to sue. And a special demurrer was interposed to so much of the petition as complained that Act 606 is repugnant

to the Constitution of Arkansas. This resulted in the filing by appellant of an amended petition; and by permission of the court the original demurrers and response of appellees were treated as demurrers and response to the amended petition. And the cause was submitted to the court upon the amended petition and demurrers and response thereto as set out in the transcript, pages 2 to 9.

### ARGUMENT AND BRIEF.

#### I.

Replying to appellant's brief (pages 5 and 6), appellees concede that analysis of the Act discloses:

1. Tax to be paid by the purchaser.
2. Tax to be collected by the seller.
3. Act to be enforced against the seller in its regulations.
4. That the burden of collecting and accounting for the tax and making report is laid upon the seller.
5. That the State confers upon all, who collect, report and pay over such tax, the right to sell gasoline or other products for use on the highways. (Act No. 606, Tr., pp. 10 and 11.)

And upon the latter concession the appellees contend that in the exercise of her police power the State as a sovereign may impose upon individuals and corporations such reasonable rules and regulations as are necessary for adjustment and administration of her tax-

ing systems. Without this inherent police power no government could administer its laws, either civil or criminal; and such police power as an attribute of sovereignty like the taxing power extends to all things not prohibited by the Constitution.

"Unlimited power of taxation is an essential attribute of sovereignty, and restriction on the power to impose a particular kind of tax must be found in the Constitution. The constitutional provisions respecting uniformity in taxation apply only to property taxes and not to taxation of privileges. The State may select the privileges to be taxed; and the omission, from the list to be taxed, of a number of occupations does not constitute an unlawful discrimination between persons in like situation."

Davies vs. Hot Springs, 141 Ark., 521.

"It was never contemplated when the Fourteenth Amendment was adopted to restrain or cripple the taxing power of a State, whatever the methods they devised for the purpose of taxation, unless those methods by their necessary operation were inconsistent with the fundamental principles embraced by the requirements of due process of law and equal protection of the law."

Southwestern Oil Co. vs. Texas, 217 U. S. 114.

"The State in the exercise of its police power may fully and completely regulate the business of insurance."

Fireman's Insurance Co. vs. Davies, 130 Ark., 576; also

Lewelling vs. Mfg. Woodworkers' Underwriters, 140 Ark., 124.

"The police power, speaking generally, is reserved to the States; for there is no grant thereof to Congress."

Keller vs. United States, 213 U. S., 138.

"The power of the States to regulate matters of internal police within their limits, applies not only to the health, morals, and safety of the public, but also to whatever promotes the public peace, comfort and convenience."

Boston Beer Co., vs. Massachusetts, 97 U. S., 25, and a long line of decisions down to Bown vs. Walling, 204 U. S., 320.

And it is in recognition of the police power, that legislation in the regulation of persons in their conduct and solial relations and in regulation of persons and corporations in the use of property and conduct of business is sustained. It is under this police power that the states prohibit some claimed rights and regulate others. By the police power the states, responsive to the needs of the public and by appropriate legislation, regulate the business of citizens, popular assemblies, public schools, courts and judicial proceedings, the administration of law and many other incidents of government, including the adjustment of her taxing systems.

The Act does not hold appellant responsible for the debt of another as complained, because the tax does not attach until gasoline, kerosene or other product is passing from the vendor to vendee for use on the high-

ways; and in delivery for such use without the tax, the vendor under the terms of the law is consenting to payment of the tax or is conniving with the vendee for evasion of the tax. The Act regulates the sale of gasoline, kerosene and other products for use on the highways only as is necessary to tax such use; and it lays no greater burden on the appellant as a vendor than is necessary in ascertaining, collecting, reporting and accounting for the tax due. And in requiring such vendor to collect, report and pay over such tax there is no denial of due process within the meaning of the State or Federal Constitution, because ample provision exists under the general law for contesting and litigating the claim for the tax in any given case.

## II.

Appellant insists that the tax of the Act is a property tax and violates paragraph 5 of Article 16 of the State Constitution, "in that said Act levies an arbitrary tax upon property and not according to its value, and in that said tax is not uniform and equal" (Brief, p. 4).

Appellees conceded in the court below and now concede that the tax laid in the Act can not be sustained under our Constitution as a property tax. But appellees insist that the tax is not laid upon gasoline or other products as such, nor the sale as such; but is laid upon

the use in propelling motor vehicles of combustible type engines upon the highways. Section One of the Act reads:

"That all persons, firms or corporations who shall sell gasoline, kerosene, or other products to be used by the purchaser thereof in the propelling of motor vehicles using combustible type engines over the highways of this State, shall collect from such purchaser, in addition to the usual charge therefor, the sum of one cent per gallon for each gallon so sold."

Thus it will be seen that the tax is not laid upon gasoline as contended, but is laid on the use in propelling motor vehicles on the highways; and such use for purpose of taxation is measured or determined by the gallons consumed, as a premise for reckoning the tax on a fair and equitable basis.

It will be further noted that the sale of gasoline is not taxed, because the tax obtains only on gasoline or other products used on the highways and is to be paid by the user; and all other gasoline whether sold, given away or retained is exempt from tax. The tax is laid upon the user on the highways; and the vendor is made an agent for the collection of the tax from such user.

The tax is not upon the purchase or ownership because a purchaser may acquire gasoline and other products for any and all other uses without incurring the tax; but under the terms of this Act, the instant

one acquires in this State, by purchase or otherwise, gasoline or other products for propelling motor vehicles of combustible type engines upon the highways the tax applies; and the vendor is enjoined to collect, report and pay over the tax levied by the Act. And such vendor, as agent of the State in such collecting and accounting, is privileged and expected to adopt and apply reasonable rules and regulations for conduct of such business and guidance of the buying public, and such as are necessary for the protection of itself in determining the use to which gasoline and similar products applied for is to be put.

"Statutes are to be construed by ascertaining the legislative intention; and the legislative intention must be inferred from the plain meaning of the words used."

Ricard vs. State, 133 Ark., 1.

"In construing a statute, some meaning should be given to every word contained therein, if possible."

State vs. Embrey, 135 Ark., 262.

"Parts of statutes relating to the same subject must be read in the light of each other."

State vs. Hanna, 131 Ark., 129.

"In construing statutes, each section is to be read in the light of every other section, and the object of the Act is to be considered; and the *intent*

should prevail over inconsistencies."

Rayder vs. Warrick, 133 Ark., 491.

"A statute will be construed as a whole to determine its intent and meaning."

Dobbs vs. Holland, 140 Ark., 398.

When measured by these tests the statute in question clearly reflects intent of the Legislature to lay a privilege tax upon the use of gasoline and other products in propelling motor vehicles of combustible type engines upon the highways, and to graduate or measure such privileged use, for purpose of taxation by the number of gallons so used. Since appellees concede the tax must fall as a property tax, we pass without further notice so much of appellant's argument as is premised upon this contention; and pursue appellees' theory of a privilege tax.

### III.

Act 606, in question, is not out of harmony with the Constitution and law applying to privilege taxes; and the Legislature, in its enactment, has recognized the fact that her highways are built by improvement tax laid upon her citizens classified as owners of real estate which burden is to continue indefinitely, that such highways must be maintained in repair for use of all her citizens—owners of automobiles as well as owners of real estate, and that the heavy traffic and

use by automobiles and trucks does most injury and damage to her highways. And to create such a maintenance fund the State by this Act classifies such heavy users and lays this tax to apply to all coming within the classification.

The Arkansas Constitution provides:

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges, in such manner as may be deemed proper."

Const. of 1874, Sec. 5, Art. 16.

In construing and sustaining an Act of 1909 which levied a license tax upon peddlers of lightning rods, steel ranges, clocks, pumps, buggies and carriages, the Arkansas Supreme Court, speaking by Chief Justice McCulloch, said:

"The Constitution of this State (Art. 16, Sec. 5) provides that 'the General Assembly shall have power, from time to time, to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed necessary. But aside from any express constitutional sanction, as said by Judge Cooley, 'everything to which the legislative power

extends may be the subject of taxation, whether it be person or property or possession, franchise or privilege, or occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the Legislature in its discretion shall at any time select it for revenue purposes.' (Cooley on Tax. 3 Ed., p. 9.) We need not stop, therefore, to consider whether the statute in question imposes a tax for revenue purposes or is merely a police regulation, for the Legislature can exercise either power, and its effect is to impose a license tax on certain privileges. If the statute be found free from objection on the charge of unjust classification, it can be justified either as a police regulation or as a privilege tax imposed for the purpose of raising revenue. It does not impose a property tax, and is, therefore, not within the constitutional mandate requiring that all property shall be taxed according to its value, and that all taxation shall be equal and uniform." *Ex parte Byles*, 93 Ark., 616.

It is under this clause of our Constitution that inheritance taxes and the various forms of franchise taxes are laid and uniformly sustained by our courts, though levied for State revenue purposes. In sustaining a Texas statute, Kennedy Act of 1905, which imposed upon all wholesalers of coal oil, naphtha, benzine, and all mineral oils an occupation tax of 2 per cent upon the gross sales within the State, the Supreme Court of the United States said:

"Except as restrained by its own or the Federal Constitution, a state may prescribe any system of taxation it deems best; and it may, without violating the Fourteenth Amendment classify occupations, imposing a tax on some and not on others, so long as it treats equally all in the same class. And on writ of error this court is not concerned with the question of whether the statute attacked as unconstitutional under the Fourteenth Amendment violates the state constitution if the state courts have held that it does not do so."

Southwestern Oil Co. vs. Texas, 217 U. S. 114, affirming 100 Tex. 647.

It is perhaps true, as urged by appellant, that use of the highways is a common law right ancient as the highways; but it is also true that such use by automobiles and heavy motor driven trucks is recent and modern as such vehicles are recent and modern. It is demonstrated by the experience and history of all civilizations that conditions and relations are constantly shifting and changing as progress and development and world contact may eventuate. And it is for this very reason that the police and taxing power is inherent and has no limitation save that specifically expressed in the Constitution of the sovereign government. In the effort to establish and maintain her highways, the state may exercise her inherent and sovereign power of taxation in any way and all ways not prohibited by the State or Federal Constitution; and acting through her Legisla-

ture may classify the uses of her highways, and tax certain of said uses as a privileged use. This she has done by Act 606, and in language sufficiently clear that the court is not called upon to read anything into the Act by inference or implication. And we insist that the Act does not contravene any common-law right of appellant either as a vendor of gasoline or as an user thereof on the highways.

It is argued with apparent earnestness that the tax levied can not be a privilege tax because the Act carries no clause *declaring the use of the highways to be a privilege*, and because no penalty is prescribed for abuse or unlawful use of the privilege. (Brief, 4.) Though we doubt the sincerity of this contention, we reply that the highways are the property of the State and her various counties, are created and maintained for public use, subject to such restriction and regulation as may be prescribed by law. Act 606 is a restricting and regulating tax measure; and does not require a preamble or clause *declaring the use of the highways to be a privilege*. We further answer that one who would make use of the highways in motor vehicles of combustible type engines without paying the tax is penalized by inability to purchase gasoline for such use, because by provision of Section One it is the duty of vendors to "collect from

such purchaser, in addition to the usual charge therefor, the sum of one cent per gallon for each gallon so sold." And should a purchaser for such use decline to pay the tax, the vendor should refuse to sell. Section 2 of the Act requires report of gasoline or products sold for such use, and payment of the tax into the county treasury; and should the vendor fail to collect said tax or connive with the purchaser for evading the tax, such vendor is subjected to personal liability for the same. And under provisions of Section 6 the vendor is not only required to make report of sales and account for such tax, but he is penalized for a failure in either duty by subjection to the tax and a fine of not less than "ten nor more than one thousand dollars." We, therefore, submit that such privileged user of the highways is deprived of gasoline or other products for such privileged use unless he pays the tax; and the vendor is penalized for conniving with such user for evasion of the tax.

#### IV.

Appellant complains that the *Act is void for uncertainty*, that purchasers in evasion of the tax may fraudulently obtain gasoline and other products for such use; and submits a hypothetical case in argument. (Brief, 7 and 8.) To this argument we answer that no law is to be tested by a hypothetical case or any ex-

treme situation. We further reply that under the Federal Constitution, Congress alone may pass laws regulating interstate commerce and intercourse; but because this is so, is no argument that the State may not tax a given privilege within her borders when exercised by those subject to her tax jurisdiction. While the Attorney General for the State admits it to be possible that evasions are possible in border cities and otherwise as suggested in appellant's hypothetical case, he in no sense admits that such possible evasions are necessarily the fault of the law; but, on the contrary, contends that by the terms of the Act all vendors of gasoline and products for such use on the highways are made the State's agents for the collection of such tax. And that under police power inherent in every sovereign, the State may rightfully say to the resident and non-resident vendor, if you sell gasoline and other products in Arkansas for such use on her highways, you must collect, report, and pay over the tax on such use. It may be true, as suggested in appellant's hypothetical illustration, that the law is defective, in that it is possible for some to evade the payment of this tax; but this is true of all tax laws, and does not necessarily cut down the Act as unconstitutional. The fact that there are possibilities for evasion, or even instances of evasion, is

an argument for amendment and strengthening of the law so as to preclude such evasion; but it is surely no argument for declaring the law unconstitutional. Experience in legislation discloses that laws come into existence responsive to needs of the people, and all statutes are a process of evolution within constitutional limitations, being strengthened and amended from time to time as administration of the law points the necessity; and the courts may safely trust the legislative agency to so amend this law within the limitations of the State and Federal Constitutions as construction by the courts and experience and administration of the law points the way. This objection of appellant's hypothetical case addresses itself to the Legislature rather than to the judiciary; and the question here is not whether it is possible for some persons to evade the tax, but whether the tax as laid is within constitutional limitations:

"Any act which manifests a design that any particular provision shall be the law is a sufficient enactment."

Wood vs. Wood, 54 Ark., 172, and  
State vs. Corbett, 61 Ark., 226.

Act 606 defines the duties of vendors of gasoline and similar products for use on the State's highways and it is practical for such vendor to ascertain the intended

use when applied for, and thus hedge against the subjection to tax on gasoline and products for such use fraudulently obtained—

“A law providing that if any clerk shall knowingly and willingly do any act contrary to the duties of his office or fail to perform any act or duty required of him by law, he shall be deemed guilty of misdemeanor in office, on conviction shall be removed from office, is not open to objection of vagueness.”

Howard vs. State, 72 Ark., 586.

The privileged user who fraudulently obtains gasoline and other products for such use on the State's highways may be subjected to the tax on such use under the general laws; and the vendor under Act 606 is required to make report of all sales of gasoline and similar products so that the State may police their uses. And it is only when such vendor negligently or wilfully connives with a purchaser for such evasion that he incurs the penalties of the Act. The vendor's duty to collect, report and pay over is made definite and certain by the terms of the Act; and we submit that the Act is neither vague nor uncertain. If the vendor in good faith wants to comply with this law, he may require of every applicant for purchase of gasoline or other product suitable for such use on the highways, a signed declaration of the use to which same is to be

put. And should the applicant demur thereto and refuse payment of the tax, the vendor not only may, but *should*, require such signed declaration, showing date and number of gallons sold, and the use designated; and if some such reasonable and necessary regulation be adopted by the vendor, the courts will uphold and protect him therein. The gasoline is in the hands of the vendor, and in obedience to this law he may and should say to the would-be purchaser, there is a tax on certain use of this article and if you buy for this use I am required to collect same, report and pay it over. And if you buy it for a tax-free use, you must leave with me a signed declaration of that use, so I may report and protect myself. And if the applicant declines to pay the tax and declines to file a declaration of a tax-free use, the vendor may decline to sell; and upon such refusal the product is still in the hands of the vendor and no tax has attached. It may be argued that dishonest purchasers would make false declarations in evasion of the tax; but a law is not unconstitutional or to be condemned because some persons subjected thereto may be dishonest. Neither would a vendor of gasoline be held criminally or in an action at law for a tax accruing on the use of a product thus fraudulently obtained, unless by connivance or otherwise he partici-

pated in such fraud. There is no uncertainty or indefiniteness in the terms of this law—the tax is laid definitely and certainly upon use of gasoline and other products used in motor-driven vehicles of combustible type engines upon the State's highway and accrues against the user at the instant of purchase. If the purchaser files with the vendor a false declaration of the product's use, the fraud attaches to the purchaser and not to the vendor. It is true the law does not require a written declaration of use by the purchaser, nor is such provision necessary, because the vendor has an inherent right to adopt rules in conduct of his business which are necessary for his protection in conforming to the law; and the presumption always obtains that he will do so. The Act is definite and certain in requiring the vendor to report sales, collect and pay over the tax; and no liability or penalty attaches, except upon default in one or more of their duties. And we submit that the authorities cited by appellant on this contention reflect utterances of the court in construction of statutes which were open to objections not found in Act 606.

Appellant professes uncertainty as to where the tax is laid; and insists that "the court below inter-

preted the Act to be a tax on the privilege of selling gasoline." (Brief, 4.)

In reply we quote the finding of the courts below:

"And the court being now well and sufficiently advised as to the issues of fact and of law herein, doth find that Act No. 606 of the General Assembly of Arkansas, approved March 3, 1921, is not a property tax but is a privilege tax, and as such is not repugnant to either the Constitution of Arkansas or the Constitution of the United States." (Tr., 11 and 24.)

It is true that the first decree does not state what privilege is taxed; but the U. S. Circuit Court of Appeals held it to be a tax upon the privilege of making sales (Tr., p. 21) and the appellant made the same attack and contentions in the lower courts as he makes here. And appellees there, and here, admitted the Act could not be sustained as a property tax and that it could only be sustained as a tax upon the privileged use of the State's highways and gauged or measured by gasoline and other products consumed in such use or a tax upon the sale for such privileged use. No other contentions were before the Court; and in the light of the court's language under these circumstances it is fair to presume, and we think clearly reflected in the record, that the court below interpreted the Act to be a tax upon the privileged use of the State's highways or upon

sales of gasoline for such privileged use. Such was the State's contention as reflected by her argument in briefs in the lower courts; and such is her contention now, because the language of the Act is not susceptible of any other construction.

Before submitting our analysis of the Act, we invite this court's attention to the following rules of interpretation and construction as adopted and announced by the courts:

"The language of a statute should be fairly and rationally interpreted, so as to carry out the legislative intention; and if it is susceptible of two constructions, one of which will lead to an absurdity and the other not, the latter will be adopted."

State vs. Jones, 91 Ark., 5; also

McDaniel vs. Hearn, 120 Ark., 288.

"An intent to give extra-territorial effect to a statute will not be ascribed to the lawmakers unless the language employed affords no escape from such construction."

Leanord vs. State, 95 Ark., 381.

"The elementary rule is that every reasonable construction must be resorted to, in order to save a statute from unconstitutionality."

Hooper vs. California, 155 U. S., 647, citing 3 Peters, 443; 12 Peters, 72; 14 Peters, 178; 112 U.S., 261, and 116 U.S., 252.

The Act in question, as shown on its face and contended by appellees, levies a specific and definite PRIVI-

LEGE TAX upon all USERS of gasoline or other products consumed in propeling motor vehicles of combustible type engines over the highways of this State; and lays same as a burden upon the consumer for the PRIVILEGE OF SUCH USE ON STATE'S HIGHWAYS. The Act does not tax gasoline as property, but does tax its use on the highways at the rate of one cent (1c) per gallon; and lays same as a burden upon all who get such privileged use and benefit of the State's highways. Section 1 of Act.

It requires all persons making sales to purchasers for such use to register with the County Clerk and to file with him on or before the tenth of each month an itemized and verified statement showing such sales and the tax thereon for the preceding month; and to pay into the county treasury the amount. Section 2 of Act.

It requires all wholesalers to file with the County Clerk on or by the tenth of each month a verified statement showing distribution to each retailer within the county during the preceding month. Section 4 of Act.

It requires the County Treasurer to make monthly report of tax payments and enjoins upon the County Judge an inspection of said report and a distribution of the tax—one-half to the county road fund and one-

half to the State Highway Improvement Fund. Section 5 of Act.

In further argument we can do no better than to submit our brief as offered in the court below.

1. *Does the Act contravene Section One of Fourteenth Amendment to the Federal Constitution and Section Eight of Article Two of the State Constitution, as alleged?*

The clause of Fourteenth Amendment here invoked reads:

"No State shall abridge the privileges or immunities of citizens of the United States. \* \* \* Nor shall any State deprive any person of life, liberty, or property without due process of law."

And the clause of the State Constitution referred to reads:

\* \* \* "Nor be deprived of life, liberty or property without due process of law."

The Act does not hold the appellant for the debts of another, but simply regulates the sale of gasoline for use on the highways by requiring the vendor to collect such tax from the purchaser. Neither does the Act subject appellant to fine for the act of another, committed without appellant's connivance, consent or

participation, because in making such sales and failing to collect the tax required the vendor would be consenting and conniving with the purchaser for evasion of the tax in violation of the terms of the law. Neither does the Act deprive appellant of property and appropriate same to use of another as alleged, because the tax is laid on appellant's purchaser for privileged use on the highways, and nowhere falls upon property of the appellant as vendor, nor is appellant's property taken for another. But the taking of property by the State is not denied under these constitutional provisions when done under due process of law.

What is due process of law?

"Due process of law has never been precisely defined. While its fundamental requirement is opportunity for hearing and defense, the procedure may be adapted to the case; and proceedings in court are not always essential. The laws of a State come under the prohibition of the Fourteenth Amendment only when they infringe fundamental rights."

Ballard vs. Hunter, 204 U. S. 241, affirming 74 Ark., 174, St. Francis Levee Tax.

"Due process of law requires, in judicial proceedings, a court having jurisdiction over the subject matter and also over the person or property to be affected by the judgment."

Pennoyer vs. Neff, 95 U. S. 714-733.

"The words 'due process of law,' in the Fourteenth Amendment, do not necessarily require an indictment."

110 U. S., 516.

"The provision in Fourteenth Amendment that no State shall deny to any person the equal protection of the laws does not prevent a State from adjusting its taxing system in all reasonable ways or compel the State to adopt an iron rule of equal protection."

Bell's Gap Ry. Co. vs. Pennsylvania, 134 U. S., 232.

"The discriminations which are open to objection under some inhibitions are those where persons engaged in the same business are subject to different restrictions or are held entitled to different privileges under the same conditions."

Soon Hing vs. Crowley, 113 U. S., 703, affirming California Supreme Court (Laundry Case).

"Section One of the Fourteenth Amendment means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes in the same and under like circumstances."

Missouri vs. Lewis, 101 U. S., 22 (and many cases there cited), involving revocation of attorney's license.

"A citizen of another State receives equal protection of the laws of a State when the State law is impartially administered with its benefits and

obligations in a matter which is within the State's control."

Eldridge vs. Treevant, 160 U. S., 452, affirming Louisiana Supreme Court.

"A State statute which affords opportunity in a suit at law for collection of a tax, to judically contest the validity of the proceeding, does not deprive of property without due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution."

Kentucky Railroad Cases, 115 U. S., 321, Taxing Statute.

"A State law which provides for the impartial application of the same means and methods to all constituents of each class, so that the law shall operate equally and uniformly on all persons in similar circumstances, denies to no person affected by it equal protection by the law within the meaning of the Fourteenth Amendment to the Constitution of the United States."

Kentucky Railroad Cases, 115 U. S., 321, Taxing Statute.

"The Constitution contains no definition of the word 'deprive' as used in the Fourteenth Amendment. To determine its significance it is necessary to ascertain the effect which usage has given it when employed in the same like connection. Down to the time of adopting the Fourteenth Amendment, it was not supposed that statutes regulating the use or even the price of private property necessarily deprived an owner of his property without due process of law. The Fourteenth Amendment does not change the law in this

particular; it simply prevents the States from doing that which will operate as such a deprivation."

Munn vs. Illinois, 94 U. S., 123 (Warehouse Case).

"A State statute for raising revenue which requires statement to a designated official for receiving statement, and which affords opportunity in a suit for collection to judicially contest, does not deprive of property without 'due process' within the meaning of Fourteenth Amendment."

Kentucky Railroad Tax Case, 115 U. S., 321.

"If the laws enacted by a State be within the sphere of legislative power, and their enforcement be attended with the observance of those general rules which our system of jurisprudence prescribes for the security of private rights, the harshness, injustice and oppressive character of such laws will not invalidate them as affecting life, liberty, or property without due process of law."

Mo. Pac. Ry. Co. vs. Humes, 115 U. S., 520;  
also In Re Kemler, 136 U. S., 448 (statute of double damage in Missouri).

"A State law of New York in levying tax of one per cent upon the shares of stockholders of all banks and banking associations, and in requiring such banks to collect from their shareholders and pay over such tax to the county treasurer, and penalizing such banks to the extent of the tax and \$100.00 per day for each day of delay in failure to collect and pay over, does not contravene the Federal Constitution and law, and is not discriminatory."

New York vs. Amoskeag Sav. Bk. vs. Purdy,  
231 U. S., 373.

"A State tax upon interest-bearing deposits requiring the bank to pay and charge to depositor, relieving the depositor from making any return on his interest-bearing deposits, does not unfairly discriminate against banks."

Clement Natl. Bk. vs. Vermont, 231 U. S., 120.

"Kentucky statute requiring banks to list its shares of stock for taxation, and further requiring it to pay such tax and charge to the shareholder, and holding the banks for a penalty in default (of either duty) does not operate to discriminate against the banks contrary to Federal law nor deny due process."

Citizens Natl. Bk. vs. Kentucky, 217 U. S., 443.

"A State statute which prohibits a safe deposit company from permitting removal of the contents of a box after death of the renter without retaining sufficient assets to pay inheritance tax and penalizing to extent of the tax and one thousand dollars additional, does not deprive of property without due process of law nor arbitrarily burden with liability."

Natl. Safe Dep. Co. vs. Stead, 232 U. S., 58.

This was an inheritance law of Illinois, approved July 1, 1909, and in Section 9 thereof provided:

"No safety deposit company, corporation or person having in possession or control securities or assets belonging or standing in the name of a decedent or in the joint name of a decedent and another person, or in the name of a partnership of which deceased was a member, shall deliver such assets to

the legal representative of the deceased or to the survivor of the joint holder, or to the partnership of which he was a member, without ten days' notice to the Attorney General and Treasurer of the State who are authorized to examine the securities at the time of delivery. It is further provided no delivery shall then be made without written consent of such State without retaining a sufficient portion to pay the State tax thereafter assessed. And failure to give notice and retain such amount shall render such safety deposit company liable to the tax and a fine of \$1,000.00."

And after a vigorous attack in the case above cited, the act was sustained affirming the judgment of the Illinois Supreme Court.

The Act 606, here attacked, fixes the time when all vendors of gasoline to purchasers for use on highways shall make report of sales and of tax collected, and designates the parties to whom report and payment is made, and the means for knowing the sales and the amount of tax are definite and certain; and there is no depriving of property or punishment to appellant without its connivance, consent and participation with taxpayers in evasion of law, nor is there lack of due process.

"The statute, by fixing the time the bank shall make report of its shareholders and the tax thereon, and directing the Auditor General to hear any stockholder who may desire to be heard, provides 'due process of law.' "

Mer. and Mfrs. Bk. vs. Pennsylvania, 167 U. S., 461.

"The privileges and immunities of citizens of the United States are not unconstitutionally abridged, nor junk dealers denied equal protection of the law by the provisions of a New York statute of 1903, Chap. 326, which, as construed by the highest court of that State, make it a criminal offense for a junk dealer to buy or receive stolen wire, cable, copper, lead, solder, iron or brass used by or belonging to a railroad, telegraph, telephone, gas or electric company without making a diligent inquiry to ascertain whether the seller has a legal right to sell."

Rosenthal vs. New York, 226 U. S., 260.

"The making of a national bank the agent of the State for collecting the tax upon stock of its shareholders is a mere matter of procedure; and there is no discrimination against the national banks in the fact that the State banks are not so compelled because the Auditor General looks to their stockholders directly."

Mer. and Mfrs. Bank vs. Pennsylvania, 167 U. S., 461.

"The constitutionality of a State statute in relation to taxation is to be determined not by the form or agency through which it is to be collected, but by the subject upon which the burden is laid."

Section 288, page 1624, Vol. 2, Digest of U. S. Ct. Reports, and cases there cited.

"In Crandall vs. State of Nevada, 73 U. S., 35, the State had passed a law requiring those in charge of all the stage coaches and railroads doing

business in the State to make report of every passenger who passed through the State or went out of it by their conveyances, and to pay a tax of one dollar for every such passenger. The argument was there urged that the tax was laid on the business of the railroads and stage coach companies; but the court said, as in the passenger cases, that it was a tax which must fall upon the passenger and be paid by him for the privilege of riding through the State by the usual vehicles of travel."

"And in the case of the State Freight Tax, 82 U. S., 232, the court said the inquiry is upon what does the tax really rest, and not upon the question from whom the State exacts payment."

Cook vs. Pennsylvania, 97 U. S., 571.

"Legislation is not open to the charge of depriving one of his rights or property without due process of law, if it be general in its operation upon the subject to which it relates and is enforceable in the usual modes established in the administration of government with respect to kindred matters—that is, by process and proceedings adapted to the nature of the case, and such is the Act of West Virginia in question."

129 U. S. 114, affirming the Supreme Court of West Virginia in regulating practice of medicine and licensing thereto.

We submit that Act 606 is within the legitimate sphere of legislative power as defined by the State Constitution, her Supreme Court and the Supreme Court of the United States.

"The State's ancient right of eminent domain and of taxation is herein fully and expressly con-

ceded; and the General Assembly may delegate the taxing power, with necessary restriction, to the State's subordinate political and municipal corporations, to the extent of providing for their existence, maintenance and well being, but no further."

Section 23, Article 2, Constitution of 1874.

"The State Constitution is not a grant of enumerated powers; and the Legislature may rightfully exercise its legislative powers, subject only to the limitations and restrictions fixed by the Federal and State Constitutions."

St. Louis, Iron Mtn. Ry. vs. State, 99 Ark., page 1.

Butler vs. Fourche Drainage Dist., 99 Ark., 100.

"The constitution is the paramount law to which all other laws must yield, and is the measure of the rights and powers of the Legislature."

Marvin vs. Fussell, 93 Ark., 336.

"The Legislature has power to make such laws as are not expressly or by necessary implication prohibited by the Constitution."

McClure vs. Topf & Wright, 112 Ark., 342.

"The right to tax is sovereign, is indispensable to all governments; and while it may be restricted by the Constitution, this right needs no clause to confer it."

Ouachita County vs. Rumph, 43 Ark., 527.

"The Federal Constitution is an enumeration of powers granted by the people and the States to Federal control; and the State Constitu-

tion is a Bill of Rights imposing duties and restrictions upon the government and the people."

State vs. Ashley, 1 Ark., 513;

Pulaski County vs. Irwin, 4 Ark., 473, and a long line of decisions in harmony.

"The power to impose taxes is one so unlimited in force and so searching in extent that the courts scarcely venture to declare that it is subject to any restrictions whatever, except such as rest in the discretion of the authority which exercises it. It reaches to every trade or occupation, to every object of industry, USE, or engagement, to every species of possession, and it imposes a burden which, in case of failure to discharge, may result in seizure and sale or confiscation of property."

Cooley's Const. Lim., 6 Ed., 587; also Kirtland vs. Hotchkiss, 100 U. S., 491.

"The Fourteenth Amendment to the Constitution does not limit the subject in relation to which the police power of the State may be exercised for the protection of its citizens."

129 U. S., 26, affirming the Iowa Supreme Court, sustaining an Iowa statute subjecting railroads to double value of stock killed where track not fenced, on failure to pay within 30 days after notice.

"The tax power of the State is one of its highest attributes of sovereignty, and is essential to its continued existence. It is not derived from, but exists in the States independently of the Federal Constitution, and may be exercised to an unlimited extent upon all property, trades, business avocations and privileges carried on within the territorial boundaries of the State, except so far as

it has been surrendered to Federal government, either expressly or by necessary implication—subject to restriction of the State Constitution.”

Picard vs. East Tenn. Ry. Co., 130 U. S., 641.

“The presumption of constitutionality following taxing statutes is stronger than applies to law generally, and only where the taxing system clearly and palpably violates the fundamental law will a taxing statute be held invalid.”

Bridge vs. Henderson City, 183 U. S., 592.  
Also—

171 U. S., 404.

174 U. S., 754.

184 U. S., 540.

183 U. S., 479.

“Everything to which legislative power extends may be the subject of taxation, whether it be person, property, possession, franchise, PRIVILEGE, occupation or right. Nothing but express constitutional limitation upon legislative authority can exclude from the grasp of the taxing power if the Legislature in its discretion shall select it for revenue purposes.”

Cooley on Taxation, 2 Ed. 5; also

Clark vs. Kansas City, 176 U. S., 119.

“When the State Legislature has declared that the policy of the State requires a certain measure, it should not be disturbed by the courts under the Fourteenth Amendment, unless it is clearly seen that the law should be extended to classes left untouched.”

M. K. & T. Ry. Co. vs. May, 194 U. S., 267,

and Williams vs. Ark., 217 U. S., 79, affirming 85 Ark., 470, in Hot Springs drumming cases.

"The police powers of the State extend to all things essential or necessary to the safety, health and comfort and morals of citizens, and the States have been upheld in every form of taxation and regulation for the public good without the constitutional limitation as illustrated by the Warehouse Cases in:

Munn vs. Ill., 94 U. S., 179.

The Mining Cases from Arkansas and Utah.

McLean vs. Williams, 211 U. S., 539, affirming Arkansas Supreme Court, 81 Ark., 304 (Coal Screening Act).

Holden vs. Hardy, 169 U. S., 366, affirming Supreme Court for State of Utah.

"The privilege of drumming on premises of common carriers for hotels, lodging houses, eating houses, bath houses, physicians, masseurs, surgeons and medical practitioners may be singled out and denied by Arkansas statute of April 30, 1907, without denying equal protection of the laws to the business and professions therein mentioned.

Williams vs. Arkansas, 217 U. S., 79, affirming 85 Ark., 470.

"The Fourteenth Amendment to the Constitution does not impair the police power of a State."

California Laundry Cases, 113 U. S., 27 and 703, affirming the California Supreme Court.

"The Fourteenth Amendment to the Constitution was not designed to interfere with the ex-

ercise of the police power by the State for the protection of health, the prevention of fraud and the preservation of public morals and comforts."

Powell vs. Pennsylvania, 127 U. S., 678.

"The police power of a State is as broad and plenary as the taxing power (as defined in *Coe vs. Escol*, 116 U. S., 517, tax on logs in New Hampshire); and property and persons within the State are subject to the operation of the former so long as within the regulating restriction of the latter."

*Kidd vs. Pearson*, 128 U. S., 1 (involving prohibition of the manufacture and sale of liquors).

"A State statute or regulation requiring engineers and other persons employed by a railroad in a capacity which calls for ability to distinguish and discriminate color signals to be examined in this respect from time to time at the expense of the company; and prescribing a penalty of not less than \$50.00 nor more than \$500.00 for employment without examination, is a proper exercise of police power, and does not deprive of property without due process of law."

*Nashville, Chattanooga and St. Louis Ry. vs. Alabama*, 128 U. S., 82.

"It is the duty of the court in testing the validity of a given statute or regulation in exercise of the police power to resolve all doubts in favor of the legislative action; and to sustain it unless it appears to be clearly outside the scope of reasonable and legitimate regulation."

*Williams vs. Arkansas*, 217 U. S., 79, affirming 85 Ark., 464.

"Under the powers inherent in every sovereign, a government may regulate the conduct of its citizens toward each other, and when necessary for the public good the manner in which each shall conduct his business and use his property. When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use and must to the extent of such use and interest submit to be controlled by the public for the common good so long as he maintains that use. Rights to property and to a reasonable compensation for its use can not be taken away without due process; but the law, as a rule of conduct, may be changed at the will of the Legislature.

*Munn vs. Illinois*, 94 U. S., 113.

"The chartered right of a corporation to do business does not operate to deprive the State of its police power; and the franchise to do business is qualified by the duty to do so conformably to lawful and proper police regulation then existing and thereafter to be enacted."

*Hammond Packing Co. vs. Arkansas*, 212 U. S., 322, affirming 81 Ark., 519.

"Nothing in the Fourteenth Amendment imposes any ironclad rule upon the States with respect to their internal taxation, or prevents them from imposing double taxation, or any other form of unequal taxation, so long as the irregularity is not based upon arbitrary distinctions."

*St. Louis S. W. R. vs. Arkansas*, 235 U. S., 273, affirming 106 Ark., 321.

"State legislation which, in carrying out a public purpose, is limited in its application, is not

a denial of equal protection of the laws within the meaning of the Fourteenth Amendment, if within the sphere of its operation it affects alike all persons similarly situated."

Barber vs. Conaly, 113 U. S., 27, and Williams vs. Arkansas, 217 U. S., 89, affirming Arkansas Supreme Court.

We, therefore, submit that the tax laid in Act 606 is not a property tax laid upon the plaintiff as a vendor of gasoline, but is a privilege tax laid upon the purchaser and consumer of gasoline on the highways or upon the sale for such privileged use, that the act itself levies the tax and does not delegate to appellant the power to levy as alledged, and that the act does not contravene Section 1 of the Fourteenth Amendment nor Section 18 of Article 2 and Section 23 of Article 2 of the State Constitution, as alledged.

*Does Act 606 contravene Section 5 of Article 16 of the State Constitution as alledged?*

"All property subject to taxation shall be taxed according to its value, that value to be ascertained in such manner as the General Assembly shall direct, making the same equal and uniform throughout the State. No one species of property from which a tax may be collected shall be taxed higher than another species of property of equal value, provided the General Assembly shall have power from time to time to tax hawkers, peddlers,

ferries, exhibitions and PRIVILEGES in such manner as may be deemed proper."

Section 5 of Article 16 of Constitution.

"The Legislature may impose a privilege tax on certain callings, uses or trades, and a privilege tax is uniform if it bears equally upon all persons belonging to the class upon which it is imposed."

Byles Ex Parte, 93 Ark., 612.

"The rule of uniformity in taxation requires uniformity in the rate of taxation and in the mode of assessment. There must be an equality of burden. The uniformity must be co-extensive with the territory to which it applies, whether it be the State, a county, township, city, town or district."

Fletcher vs. Oliver, 25 Ark., 289.

"A tax on foreign and domestic corporations doing business in the State, for the privilege of exercising franchise therein, is not in violation of Article 16, Section 5 of the Constitution requiring that all taxes shall be equal and uniform, since the privilege of exercising a corporate franchise is not property within the meaning of the constitutional requirement."

St. Louis S. W. Ry. Co. vs. State, 106 Ark., 231, and later on appeal affirmed in the U. S. Court, 235 U. S., 265.

"In determining the propriety of a classification made by the Legislature for the purpose of taxing or regulating privileges or occupations, it is the duty of the courts to uphold the legislative determination unless the classification is clearly unreasonable and arbitrary—the Legislature being primarily the judge as to that."

Byles Ex Parte, 93 Ark., 612.

"Inheritance taxes are not laid upon the property, but upon the privilege or right of succession thereto; and not subject to the same tests with respect to equality and uniformity as taxes levied upon property."

State vs. Handlin, 100 Ark., 549.

"The Legislature has power to authorize cities to impose a tax upon the privilege of driving vehicles upon the public streets; and such act does not contravene Section 5 of Article 16 of the Constitution because not a tax upon property, but a privilege tax. Nor is the act void as discriminating in favor of those who dwell outside of the city."

Fort Smith vs. Scruggs, 70 Ark., 549.

"Taxing memberships in an incorporated chamber of commerce does not deny the member equal protection of the law guaranteed by the Fourteenth Amendment, because the State statute exempts from such taxation the members of an associated press, lodges, fraternal orders, churches, etc."

Rogers vs. Hennefin County, 240 U. S., 184.

"The power of the Legislature in establishing different methods of taxation for different persons and property, is that of classification, and such power is recognized on all hands; but the extent of the power depends upon the meaning of classification. The right to classify is not the right to act arbitrarily, or to deprive persons of the most fundamental sorts of protection accorded to persons generally. Classification means only the division of persons or properties into different classes on some basis or principle that from its own nature, and from the nature of the persons or properties

classified, affords a reasonable and just ground for the different treatment of the different classes."

Gulf, Col. and Santa Fe Ry. vs. Ellis, 165 U. S., 150.

"The basis of classification must be natural and not arbitrary."

Gulf, Col. and Santa Fe Ry. vs. Ellis, 165 U. S., 150.

"Classification of the subject of taxation is necessary to secure true uniformity and equality of taxation, and the requirements of the Federal Constitution have been fulfilled if the rates, though different for separate classes, operate uniformly on each class.

Cincinnati, N. O. T. P. R. R. Co. vs. Kentucky, 115 U. S., 321; also

Sections 300 to 336 of Vol. 2, Dig. of U. S., Sup. Ct. Reports, page 1624 *et seq.*

"The business of the person or his property is to be classified for taxation with reference to the entire business and use, rather than by comparison with some other business or property which is engaged, in part in, or in part of, the same business."

Am. Sugar Refining Co. vs. Louisiana, 179 U. S., 95, and

Cook vs. Marshall Co., 196 U. S., 274.

"The State may distinguish, select and classify objects of legislation, and necessarily this power must have a wide range of discretion."

Merchants Natl. Bk. vs. Pennsylvania, 167 U. S., 461; also

115 U. S., 321.

134 U. S., 594.

165 U. S., 150.  
 184 U. S., 329.  
 179 U. S., 89.  
 179 U. S., 279.  
 142 U. S., 386.  
 185 U. S., 364.  
 188 U. S., 730.  
 196 U. S., 269.  
 196 U. S., 608, and  
 194 U. S., 621.

"And it is enough that there is no discrimination in favor of one as compared with another of the same class."

Gulf, Col. and Santa Fe R. R. vs. Ellis, 165  
 U. S. 155; also  
 101 U. S., 22.  
 113 U. S., 27.  
 52 U. S., 377.  
 134 U. S., 232 and 594, and  
 142 U. S., 339.

"The Federal Constitution permits classification for purpose of taxation and permits the application of different rules of assessment, valuation and review thereof to different classes; and permits different rates thereon. It is sufficient that under the system proposed all persons within the same class are treated alike, and that there is no discrimination in favor of one as compared with another of the same class.

Bell's Gap Ry. vs. Pennsylvania, 134 U. S.  
 232; also  
 Adams Express Co. vs. Ohio, 165 U. S., 228.  
 Magoun vs. Illinois Tr. and Savings Bk., 170  
 U. S., 283, and  
 Billings vs. Illinois, 188 U. S., 97.

"Classification of the subject of taxation is necessary to secure true uniformity and equality of taxation; and the requirements of the Federal Constitution have been fulfilled if the rates, though for separate classes, operate uniformly on each class."

Cincinnati, N. O. & T. Pac. Ry. Co. vs. Kentucky (R. R. Tax Cases), 115 U. S., 321, and many cases there cited.

"No unconstitutional discrimination is made by sustaining the Tennessee merchants' tax on a corporation dealing only in goods manufactured from the produce of other States, because Section 30 of Article 2 of Tennessee Constitution provides, 'No article of the produce of this State shall be taxed otherwise than to pay inspection fees, where the highest court of the State has held that this provision refers only to a direct levy of taxation upon articles manufactured from the produce of the State and that the merchants' tax applies equally to all merchants.' "

Am. Steel and Wire Co. vs. Speed, 192 U. S., 500.

"Meat packing houses are not denied the equal protection of the laws by a tax imposed on their business under Chapter 247 of N. C. laws of 1903, because houses packing vegetables and the like are not included in the same classification and subjected to the same tax."

Armour Packing Co. vs. Lacy, 200 U. S., 226.

"A State statute laying a tax upon the business of express companies does not deny to them the equal protection of the laws because it does

not impose a like tax upon railroad, canal or steamboat companies which carry express matter."

Pacific Exp. Co. vs. Seibert, 142 U. S., 339,  
and the many cases cited therein.

"The Federal Constitution gives no right to challenge a tax law upon the sole ground of the inequalities of the burdens imposed by the law."

Mers. and Mfrs. Natl. Bk. vs. Pennsylvania,  
167 U. S., 461, and the many cases there  
cited.

"The Fourteenth Amendment to the Federal Constitution does not prevent the classification of property for taxation, subjecting one kind of property to a different rate or distinguishing between franchise, license and privilege and visible and tangible property, and between real and personal property."

Home Ins. Co. vs. New York, 134 U. S., 594,  
and many cases there cited.

"The Fourteenth Amendment was not intended to compel the States to adopt an iron rule of equality of taxation or to prevent the classification of property for taxation at different rates, or to prohibit legislation in that regard, special either in the extent to which it operates or the objects sought to be attained by it." It is enough that there is no discrimination in favor of one as against another of the same class."

Giozza vs. Tierman, 148 U. S., 657.

"Equality of operation of statutes does not mean indiscriminate operation on persons merely as such, but on persons according to their relations."

Magoun vs. Illinois Tr. and Sav. Bk., 170  
U. S., 283.

"Assessments which are imposed equally upon  
all standing in like relation are uniformly within  
the constitutional requirement."

Cribbs vs. Benedict, 64 Ark., 555, 570.

*Is Act 606 Repugnant to Section 18 of Article 2  
of the State Constitution as Alleged by Appellant?*

Appellant complains that the act contravenes this provision because those who use gasoline in combustible type engines on the highways of the State are subject to the tax, while those using wagons and other vehicles upon the highways are not subjected thereto. And that persons purchasing gasoline outside of the State consume the same in propelling motor vehicles of combustible type engines upon the highways without payment of such tax while those who purchase within the State for such use are subjected to the tax. And in response to these complaints appellees reply:

1. Appellant, Pierce Oil Corporation, is a corporation and is not within the provisions of Section 18 of Article 2 of the State Constitution nor of Section 2 of Article 4 and Section 1 of the Fourteenth Amendment to the Federal Constitution.

See—

- Waters Pierce Oil Co. vs. Hot Springs, 85 Ark., 514.
- Chicago, Rock Island and Pacific Ry. Co. vs. State, 86 Ark., 423.
- St. L., I. M. & S. Ry. Co. vs. Board of Levee Dist., 103 Ark., 158.
- State vs. Southern Sand and Material Co., 113 Ark., 159.
- Pembina Mining Co. vs. Pennsylvania, 125 U. S., 181.
- Orient Insurance Co. vs. Daggs, 172 U. S., 557.
- Western Turf Assn. vs. Greenberg, 204 U. S., 359.

2. That appellant, Pierce Oil Corporation, is not unlawfully discriminated against because it is in operation of motor vehicles upon the highways of the State subjected to a tax upon gasoline consumed in such vehicles, while persons using other vehicles upon the highways of the State are not so taxed.

Use of the highways by motor vehicles is a privilege and such privileged use may be taxed.

"The General Assembly shall have power from time to time to tax hawkers, peddlers, ferries, exhibitions and privileges in such manner as may be deemed proper."

Section 5 of Article 16 of Constitution of 1874.

\* \* \* "Inheritance taxes are not laid upon property, but upon the privilege or right of suc-

cession thereto, and are not subject to the same tests with respect to equality and uniformity as taxes levied upon property."

State vs. Handlin, 100 Ark., 175 (Kirby).

"The Act of March 26, 1901, providing 'that cities of the first class are hereby authorized to require residents of such city to pay a tax for the privilege of keeping and using wheeled vehicles,' is not invalid, as the Act authorizes not a property tax, but a tax on the privilege of using the streets of the city."

"The Legislature has power to authorie cities to impose a tax upon the privilege of driving vehicles upon the public streets."

And Section 5 of Article 16 of the Constitution of 1874, providing that "all property subject to taxation shall be taxed acording to its value," and in such manner as to make the value "equal and uniform throughout the State" applies only to property and not to privilege taxes."

Fort Smith vs. Scruggs, 70 Ark., 549 (Riddick).

"Everything to which the legislative power extends may be the subject of taxation, whether it be person or property, or possession, franchise or privilege, occupation or right. The Legislature may impose a privilege tax on certain callings or trades without taxing other trades or callings, and a privilege tax is uniform if it bears equally upon all persons belonging to the class upon which it is imposed."

Ex Parte Byles, 93 Ark., 612 (McCulloch).

"It is doubtless true that the Legislature could not arbitrarily select certain citizens upon whom to impose the tax, while exempting others in like situation, but the rule of equality only requires that the tax shall be collected impartially from all persons in similar circumstances."

Fort Smith vs. Scruggs, 70 Ark., 549 (Riddick).

By the terms of Act 606, persons who exercise the privilege of propelling motor vehicles with combustible type engines upon the State's highways are grouped as a class and are taxed one cent per gallon for gasoline purchased for such consumption; and all persons who fall within that class are subjected to such tax.

"Legislation pertaining merely to members of a class, such as owners of automobiles, is not a denial of the equal protection of the laws where it affects alike all persons of the class affected."

Helena vs. Dunlap, 102 Ark., 131 (Hart).

"It is the duty of the court, in testing the validity of a statute, to resolve all doubts in favor of the legislative action and to uphold it unless it is clearly an abuse of legislative power. And in determining the propriety of a classification made by the Legislature for the purpose of taxing or regulating privileges or occupations, it is the duty of the courts to uphold the legislative determination unless the classification is clearly unreasonable and arbitrary—the Legislature being primarily the judge as to that."

Ex Parte Byles, 93 Ark., 612 (McCulloch).

"Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter."

United States vs. Delaware and Hudson Co.,  
213 U. S., 366, 407-8.

"Every statute is presumed to be constitutional. The courts ought not to declare one to be unconstitutional unless it is clearly so. If there is doubt, the expressed will of the Legislature should be sustained."

Munn vs. Ill., 94 U. S., 123 (Waite).

3. That appellant, Pierce Oil Corporation, in the payment of such gasoline tax is not discriminated against within the meaning of Section 18 of Article 2 of the State Constitution because persons buy gasoline outside of the State for use on highways and avoid payment of the tax.

"The Act of March 26, 1901, authorizing cities of the first class to require residents thereof to pay a tax for the privilege of keeping and using vehicles within the city is not void as discriminating in favor of those who dwell outside of the city and use a vehicle therein."

Fort Smith vs. Scruggs, 70 Ark., 549 (Riddick).

A gasoline tax law of New Mexico, Chapter 93 of 1919, levied an excise tax of two cents per gallon upon the sale or use of gasoline and a license tax of \$50.00

per annum upon distributors and \$5.00 per annum upon retailers of gasoline. An attack was made upon the Act by the Continental Oil Company, Sinclair Refining Company and Texas Company, wherein the same contentions were made as in the case at bar. The cases were consolidated and the statute, though cut down as to the license tax of \$50.00 applied to distributors and the two cents per gallon on shipments in original packages on the ground of interference with interstate commerce, was nevertheless sustained as to the two-cent tax upon retail sales of gasoline stored and dealt in within the State. And in construing the Act, the Supreme Court of the United States, speaking by Mr. Justice Day, said:

"The plaintiffs state in the bills that their business in part consists in selling gasoline at retail in quantities to suit purchasers. A business of this sort, although the gasoline was brought into the State in interstate commerce, is properly taxable by the laws of the State.

"Much is made of the fact that New Mexico does not produce gasoline, and all of it that is dealt in must be brought in from other States. But so long as there is no discrimination against the products of another State, and none is shown from the mere fact that the gasoline is produced in another State, the gasoline thus stored and dealt in is not beyond the taxing power of the State. Sales of the

class last mentioned would be subject to taxation within the legitimate power of the State."

Askren vs. Continental Oil Co., et al., 252 U. S., 444.

And in a further construction of said Act wherein the court held the act separable, and again sustained the constitutional portion thereof the Supreme Court, on June 6, 1921, speaking by Mr. Justice Pitney, said:

"A State may impose an excise tax upon the use of gasoline by a dealer at his distributing stations in the operation of his automobile, tank wagons, and trucks employed in the business of distributing his wares for sale, although the gasoline is the product of other States."

"The selection by the State of such a commodity as gasoline, as distinguished from other commodities, in order to impose an excise tax upon its sale and use, is not forbidden by the provisions of New Mexico Constitution, Article 8, Section 1, that 'taxes levied upon tangible property shall be in proportion to the value thereof, and taxes shall be equal and uniform upon subjects of taxation of the same class,' where the tax in question operates impartially upon all, and with territorial uniformity throughout the State."

"The excise tax imposed by New Mexico laws, 1919, Chapter 93, upon the sale and use of gasoline according to the number of gallons sold and used, does not, as applied to domestic sales and use, infringe rights of dealers in such product under the due process of law and equal protection clauses

of United States Constitution, Fourteenth Amendment."

Harry S. Bowman vs. Continental Oil Co.,  
256 U. S., 642.

The New Mexico tax, like the one at bar, was for creating a road fund; but unlike the Arkansas statute, it levied a tax both upon sales and upon all use of gasoline, thus assuming the dual nature of an excise and a privilege or license tax laid upon the dealer; and the same was sustained in its dual nature in so far as it applied to retail sales and use within the limits of the State, though objection was there strenuously posed and with more ground and reason than obtains here. And that under a constitution similar to ours as to taxation of tangible property. Surely Act 606 here complained of, which classifies a heavy and depleting use of the State's highways and lays upon such user a privilege tax for the maintenance of the highways, can and will be sustained when it applies only to purchasers within the State for such use and applies impartially to all such purchasers within the State, and lays the burden not upon the dealer, but upon those who get such privileged use of the State's highways, and does so under the terms within the State Constitution and not repugnant to the Federal Constitution.

Appellees suggest that the Act 606 here complained of was sustained in an exhaustive opinion rendered on April 10, 1922, by the Arkansas Supreme Court in a cause wherein Standard Oil Company of Louisiana and Gus Ottenheimer were appellants and R. B. Brodie et al. were appellees. The same attack and practically the same contentions were made in that case as are made in this case; and the Supreme Court of Arkansas by unanimous opinion affirmed the judgment of the Chancellor in holding 'Act 606, approved March 29, 1921, imposes not a property tax, but a privilege tax; and as such is not repugnant to either the Constitution of Arkansas or the Constitution of the United States.' And in such opinion the Supreme Court of Arkansas, speaking by its Chief Justice, used the following language quoted from the opinion:

"The tax on the article used does not constitute a tax on the article itself, for the privilege is not on the article but upon the use of it upon the public highways. It is, in effect, the use of the public highway that is taxed and not the use of the article itself. \* \* \*

Our conclusion, therefore, is that under a fair interpretation of the Statute it imposes, not a property tax, but a tax upon the privilege of using automobiles upon the public highways. \* \* \*

There is nothing in the provisions of the Constitution referred to which prohibits taxation for State purposes of the use of the public roads. While the public highways are for the common use of all, they belong to the public; and it is within the power of the Legislature either to regulate or to tax the privilege of using them. \* \* \*

It is true that under the terms of the Statute, a motor car propelled otherwise than by the explosive type of engine escapes the taxation imposed by the Statute, and it must also be conceded that evasions of the law in the manner indicated in the argument of counsel are possible; but this does not render the Statute arbitrarily discriminatory in a legal sense. We have often said that complete uniformity in matters of taxation is unattainable, and it is not essential to the validity of a tax, either upon property or upon privilege, that it be absolutely free from inequality or discrimination. The lawmakers have some discretion, even in legislating with reference to the power of taxation as restricted by the terms of the Constitution, and they may determine the scope and extent of the exercise of the taxing power, and a mere incidental inequality or discrimination does not affect the validity of the Statute. \* \* \*

The fact that there may be evasions of a taxation statute does not affect its validity, for all such statutes are open to evasions, if the general classification is not discriminatory, then mere incidental discriminations or opportunities for evasions do not affect its validity. \* \* \*

The dealer is not required to pay the tax, but to collect it, keep and present an account thereof and pay it over to the County Treasurer. The

purpose of the Statute is two-fold, namely, to impose a tax upon the purchaser of gasoline for use of the car; and to regulate the business of the dealer by requiring him to collect the tax and pay it over to the County Treasurer. It is certainly within the power of the Legislature to regulate the business of selling of gasoline; and it is not an unreasonable regulation, for it does not involve the payment of any fee nor the performance of any unreasonable task. The dealer has ample opportunity to reimburse himself in advance by the collection of the tax before the commodity is delivered; and he has the power to compel obedience to the law by refusing to sell gasoline unless the tax is paid, and the dealer may adopt reasonable means of ascertaining the real purpose of the purchaser of the article. Of course, there may be evasions and it can not always be definitely ascertained what the purpose of the purchaser of gasoline is, so as to determine whether or not he is attempting to evade the law; but these inherent defects in all such statutes do not affect their validity. The presumption must be indulged that the vast majority of people who purchase gasoline for use in motor vehicles will obey the law rather than attempt to evade it; and the fact that the few may evade the law does not afford reasons for striking it down. There is scarcely a tax law on the statute books of this or any other State that is not evaded in exceptional instances. \* \* \*

Finally, it is argued that the law is vague and uncertain—in so much that it is incapable of enforcement. The interpretation which we have given to the Statute, and which, we think, is a fair and reasonable one, relieves it from the charge of uncertainty, for we think that it means what we

have stated in this opinion, and that it can be readily understood. \* \* \*

Our conclusion, therefore, upon the whole case is that the Statute is valid; and the decree is, therefore, affirmed."

153 Ark., 114.

The latter decision is cited as meeting and disposing of appellant's contention in this case that Act 606 contravenes the Constitution of Arkansas.

This decision, we apprehend, under holdings announced in *Oaks vs. Mayo*, 165 U. S., 363; *Mer. Mfr. Bank vs. Penn.*, 167 U. S., 461; *Williams vs. Eggleston*, 170 U. S., 311; *St. L. SW. Ry. vs. Arkansas*, 235 U. S., 350; and many other decisions of the U. S. Supreme Court become conclusive on this court as to all questions of repugnance to the State Constitution; and leaves only the alleged repugnance to the Federal Constitution for court's consideration under this appeal. And for the sake of brevity I shall address myself only to the federal questions involved, ignoring all contentions of repugnance to the State Constitution as settled by the recent decision of the Arkansas Supreme Court.

This leaves only the following assignments by appellant to which we shall now address our argument:

a. That the Act deprives appellant of its property without due process.

b. That it makes appellant civilly liable for the debt of another without his consent.

c. That it makes appellant criminally liable for the act of another in which he does not participate.

d. And the Act is void for uncertainty.

To eliminate and simplify contentions it is conceded:

That the tax is laid upon the purchaser who uses upon the highways; and the burden of collecting, reporting and paying over the tax is laid on the vendor.

That purchasers who pay the tax are privileged to use the highways; and vendors who collect, report and pay over the tax are privileged to sell gasoline for use on the highways.

But appellant argues that the right to sell gasoline is natural and cannot be taken away or declared a privilege; and granting this contention for the sake of argument, we reply that the act nowhere denies the right to sell gasoline—it only requires that the designated use of the highways shall be taxed and that tax be measured by the gasoline consumed in the use; and,

as a matter of police regulation and convenience to the State, requires the vendor to collect same at the time of sale, report and pay over as prescribed.

Due process as used in the Federal Constitution is simply an opportunity to be heard in a tribunal of competent jurisdiction and upon equal terms or footing with all others and proceedings in court are not always essential; and that is due process which affords to all a hearing and under the same restrictions and without discrimination. The due process clause of the Federal Constitution does not prevent a State from adjusting its taxing system; "and a citizen or corporation of another state receives the equal protection of the laws of a State when the State law is impartially administered with its benefits and obligations in a matter which is in the State's control." *Ballard vs. Hunter* (Ark. case), 204 U. S., 241; 95 U. S., 714; 110 U. S., 516; 134 U. S., 232; 113 U. S., 703; 101 U. S., 22; 160 U. S., 452; 115 U. S., 321; 231 U. S., 373 and 120; and many other cases cited in our brief (24-31).

We submit that even if appellant be deprived of its property under the Act as alleged there is not lack of due process, because the act provides the filing of a report of sales by all vendors and an accounting to officers recognized by law, and it applies without discrimination

to all vendors—individual and corporate, domestic and foreign; and any action civil or criminal is on relation of an officer of the State, in the name of the State, and in established courts of the State.

The argument that appellant is held civilly for the debt of another does not logically obtain because under the act, 'tis a vendor's duty to collect the tax along with sales price of the gasoline; and if he does so there can be no debt of the purchaser for which appellant is held under the Act. It is objected by appellant that it sells gasoline for other uses and cannot know at time of the sale to what use the product is to be applied; but we answer that every business agency, private and corporate, of necessity and right adopts reasonable and necessary rules for the conduct of its business subject to regulation of the law, and such reasonable rules and regulations of business have for time out of mind been recognized and approved by the courts in administration of the law. And appellant in the sale of gasoline under the terms of this Act is not only privileged but is expected to formulate and adopt such reasonable rules as necessary to protect itself in collecting, reporting and accounting on gasoline sales. This is the system enforced by the Federal Government in enforcing the tax

on soft drinks, theater tickets, stamp taxes, etc., and is often employed by the States in regulating the sales of medicines, narcotics, poisons, etc. We are impressed that appellant and all vendors should require applicants for gasoline and similar products to sign a declaration of a tax-free use before sale without collection of the tax; and should the applicant decline to sign such a declaration the vendor should decline to let him have the product unless the tax is paid; and that the courts in the administration of the law would protect the vendor under the rule not only as to tax measured by gasoline fraudulently obtained but as to any action by an applicant to whom gasoline was thus denied under the rule. And it is certain that a vendor in his dealings with the public under a reasonable and necessary rule for his protection under this act could not be held for tax as measured by gasoline obtained on a false declaration of use—much less could a vendor be held to answer criminally unless it be shown that the vendor participated or connived in such fraud.

It is argued by the appellant that the Act is vague and indefinite in its provisions in that appellant cannot know how to conform thereto; and it is urged that the trial court erred in not holding the Act void for uncertainty. And in reply we suggest that gasoline is not

taxed; but the use of it in propelling motor vehicles of combustible type engines upon the highways is taxed and such tax is gauged or measured by the gasoline or other products so consumed and in this provision there is nothing indefinite or uncertain.

The rate is definite and certain in the sum of one cent (1c) per gallon so consumed on the highways.

The purchaser who makes such use must pay the tax and at the time of the purchase.

The vendor must collect the tax at the time of the sale, report and pay over same to the proper officers; and we submit that the Act is definite and certain in its essential provisions.

As a sovereign the State may exercise her taxing power without restriction or limitation except as expressed in her constitution and the Federal Constitution. That this Act is within the limitations of the State Constitution has been decided by her own courts; and that decision is conclusive on this court as to the State Constitution.

The only question remaining for consideration and judgment of this court is the allegation that the Act contravenes the Fourteenth Amendment to the Federal Constitution; and this can be only by denial of due pro-

cess, by discrimination or by extending such taxing power beyond her borders.

There can be no lack of due process, because equal opportunity is given to all affected by its terms for a hearing in a court of competent jurisdiction for resisting and litigating the tax.

The tax is not extra-territorial, because it carries no attempt to tax any save those who make use of the highways with motor vehicles.

The Act is not open to the charge of discrimination because the tax is laid upon all who use gas propelled motor vehicles upon the highways. It applies to persons of that class within the borders of the State. And the Act meets every requirement under the Federal Constitution as determined by the U. S. Supreme Court in 240 U. S., 184; 165 U. S., 150; 115 U. S., 321; 179 U. S., 95; 196 U. S., 274; 134 U. S., 232, and many cases cited in our brief (39 to 42).

But appellant, in its brief, complains that the Act levies a tax upon the purchaser of gasoline for privilege of using the highways and a tax upon the vendor for privilege of selling gasoline; and argues that this makes the Act void; but we reply that even if this complaint were true as made, the argument deduced therefrom is

not well founded, and is not supported by the cases cited. But even if the objection and argument of appellant obtained in this regard the contention is settled against in a recent decision of the U. S. Supreme Court in *Askren vs. Continental Oil Co., et al.*, 252 U. S., 444, sustaining a gasoline tax law which levied a tax upon all use of gasoline and a dealer's tax upon vendors of gasoline for road purposes.

Finally, it is urged by appellant that the Act must fall and be cut down because to comply with the terms of the Act will involve some expense to the appellant in the collecting, reporting, and accounting for the tax. It is now urged that such expense will approximate \$600.00 per month; and though this sum was conceded for the purpose of making the record in this case, we are impressed that such expense can and will be materially reduced by the appellant on adjustment of its business to the terms of the Act.

However, we accept the record as it is written and make reply that no greater burden and expense is laid upon the vendor in the regulation of its business than is necessary in the administration of the taxing act; and we submit that unless appellant shows the burden and expense laid upon it or that some part thereof is arbitrary and unnecessary its objection can have no legal

standing. Because the State as a sovereign may exercise her police power in imposing upon individuals, and corporations such reasonable rules and regulations as are necessary in administration of her laws and adjustment of her taxing systems; and such power goes hand in hand with the taxing power, and like the taxing power, it extends to all things not prohibited by the Constitution.

Such power is reserved to the States and the Fourteenth Amendment was never intended to cripple or hamper the States in their taxing methods; and it does not do so unless such systems as devised violate the due process clause. 204 U. S., 320; 312 U. S., 138; 217 U. S., 114, and cases in brief (5 and 6).

In the case of *Dobbins vs. Los Angeles*, 195 U. S., 223, was involved the police power and we suggest that an analysis of this case shows that it involved the absolute denial of a vested constitutional right. In response to a municipal ordinance of Los Angeles fixing the area or limits within which gas manufacture might be conducted, Dobbins had procured a permit for such gas manufacture, acquired a lot and made valuable improvements thereon; and thereafter at the instigation of a competitor the city council amended the ordinance as to nullify the permit and place without the permitted

area the gas plant of Dobbins—thus denying his rights under the permit and virtually confiscating his property. In an action to enjoin enforcement of the amended ordinance the U. S. Supreme Court sustained Dobbins and in reasoning to a decision in the case, the court restricted the police power invoked by the amended ordinance, as a violation of the due process clause of the Fourteenth Amendment. The court was careful to recognize a delegation of the police power to the city of Los Angeles by the State in whom the power was inherent; but they found the exercise or application of same in this case as arbitrary, discriminatory and oppressive and to that extent in violation of the due process clause in depriving of property and right without a hearing or just compensation. The principles announced by the court in that case were sound law then and are sound law now; but while principles remain the same in the abstract, their governing or controlling force depends upon the facts to which they are applied.

There a lawful right to a lawful business had vested in pursuance of a lawful permit under a valid ordinance; and such right was denied and property value destroyed by an amended ordinance held by the Supreme Court as void for denial of due process.

There a regulation of business was not sought; but a denial of property and right to do a lawful business was involved. In the case at bar the right to sell gasoline is nowhere denied, nor is it sought to be restricted, only such regulation of the business is sought as is necessary to administer an important revenue law.

In further objection the appellant complains that the Act deprives the vendor of the right to make contracts and insists that selling gasoline is a lawful business.

It is conceded that the sale of gasoline is a lawful business; and we reply that all lawful business is subject to reasonable regulation and control under police power inherent in the States. We go further and suggest that under her police power the State does and should suppress all unlawful business.

It is on this principle that criminal laws for protection of health, morals, peace and comfort of society are enacted and enforced. And we go still further and assert that not only may a lawful business be reasonably regulated but all lawful business may be taxed so long as the taxation is not arbitrary, discriminatory or extra-territorial.

Appellant further complains that the Act deprives of the right to sell gasoline on a credit without incurring liability for the tax; and this is conceded by the State, because the Act enjoins upon the vendor the collection of the tax at time of sale. But to this objection we reply that a vendor who credits a purchaser for gasoline at twenty-five cents per gallon as purchase price will not not likely object to crediting for the additional one-cent tax. And for this reason we regard the objection as more technical than meritorious. However that may be, the fact remains that the Supreme Court of the United States in construing a Gasoline Tax law of New Mexico in 1920 held "that it is within the power of the State to tax gasoline sales at the rate of two cents per gallon, notwithstanding a vendor's natural right to sell on credit. *Askren-Attorney General vs. Continental, Sinclair and Texas Oil Companies*, 252 U. S., 444; *Bowman vs. Continental Oil Co.*, 256 U. S., 642; *Texas Co., vs. Brown*, 258 U. S., 466.

We respectfully submit the complaint of appellant is without equity; and the judgment of the United States Circuit Court of Appeals herein should be affirmed.

J. S. UTLEY,

*Attorney General;*

JOHN L. CARTER,

WM. T. HAMMOCK,

MISS DARDEN MOOSE,

J. S. ABERCROMBIE,

*Assistants Attorney General.*